

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZACHERY DUFFY, No C-02-2250 VRW
Plaintiff, ORDER
v
SAN FRANCISCO POLICE DEPARTMENT
et al,
Defendants.

After failing to serve process within the period established by the court, plaintiff served a summons and complaint on certain individual officers of the San Francisco Police Department (SFPD) named as defendants in this action. Those officers -- Thomas Abrahamson, Jeffrey Barry, Herbert Najarro, A Freeman and Richard Trujillo (collectively, the "officers") -- move to dismiss the complaint pursuant to FRCP 12(b)(5) for insufficiency of service of process. Doc #64. H Fruchtenicht ("Fruchtenicht") also moves to dismiss the complaint under FRCP 4(m). Id. For the reasons that follow, the motion is GRANTED.

1 On February 25, 2005, the court ordered plaintiff to
2 serve process on the officers on or before March 18, 2005, after
3 plaintiff failed to serve process by the previous deadline of
4 December 3, 2004. As stated in the court's order, a "failure to
5 serve any defendant by [March 18, 2005,] will result in the
6 dismissal without prejudice of the action against that defendant."
7 Doc #42. For reasons discussed in the April 29, 2005 order, the
8 complaint was dismissed against six other officers after plaintiff
9 failed to serve any of the officers sufficiently by the March 18,
10 2005, deadline. The current officers did not join in the previous
11 motion to dismiss (Doc #50) because "they did not contact the City
12 Attorney's Office to obtain representation before the motion was
13 heard." Doc #64 at 1:15-16. Plaintiff subsequently served process
14 on these remaining officers.

15 Plaintiff essentially reargues the point raised in his
16 previous opposition (Doc #53), that the substitute service
17 attempted on March 14, 2005, should suffice since the San Francisco
18 Police Department's (SFPD) legal division allegedly assured
19 plaintiff that it would. As discussed in the April 29, 2005,
20 order, the flaw in plaintiff's argument is that the officers did
21 nothing to make it appear that they authorized SFPD to accept
22 service on their behalf. See Cal Code Civ Proc § 416.90.
23 Moreover, the officers are under no greater duty to accept
24 insufficient process than any member of the public, despite
25 plaintiff's argument to the contrary.

26 Plaintiff also argues that the deadline for service of
27 summons is tolled during litigation over the validity of service
28 and that defendants are estopped from seeking dismissal whenever

1 they have caused plaintiff to forgo service. Neither argument
2 persuades. First, litigation over the validity of service came
3 after the March 18, 2005, deadline; the deadline had already passed
4 and thus could not be tolled. See Cal Code Civ Proc § 583.240(c).
5 Were the court to accept plaintiff's reading of section 583.240(c),
6 any deadline for service would be meaningless, as any motion to
7 dismiss would extend that deadline. Second, defendants did not
8 cause plaintiff to forgo service; rather, everything in the record
9 indicates that plaintiff's procrastination caused the insufficient
10 service of process. Plaintiff had three years in which to obtain
11 summonses and serve the officers. Doc #42 at 8-9. On December 3,
12 2004, the 120-day period that plaintiff had to serve process after
13 filing the second amended complaint expired pursuant to FRCP 4(m),
14 but the court gave plaintiff until March 18, 2005, to serve the
15 officers. Plaintiff could have sought summonses on February 25,
16 2005, the date of the court's extension, giving him enough time to
17 attempt personal service and, failing that, use substitute service.
18 Plaintiff, however, waited until March 4, 2005, to seek summonses.
19 When plaintiff obtained summonses on March 14, 2005, he still had
20 the option of filing a motion to extend the March 18, 2005,
21 deadline, but no such motion was ever filed.

22 Instead, on March 14, 2005, plaintiff attempted
23 substitute service, without first attempting personal service as
24 required and with disregard to the 10-day period before substitute
25 service becomes effective. See Cal Code Civ Pro § 415.20(b).
26 Plaintiff now complains that the rules and deadlines established by
27 this court serve "no purpose except to conform to technical
28 provisions of the law." Doc #68 at 1:25-26. Plaintiff bemoans the

1 evasiveness of the officers and the rigidity of the rules,
2 overlooking the obvious root of his current predicament: His own
3 cunctation in serving the officers. Plaintiff had three years in
4 which to serve process on these defendants, and the court granted
5 additional time besides, and yet plaintiff waited until just before
6 the deadline to act. Accordingly, the court GRANTS defendants'
7 motion in regard to Abrahamson, Barry, Najarro, Freeman and
8 Trujillo.

9 The court extended for good cause the time for plaintiff
10 to serve process on Fruchtenicht until April 18, 2005. Doc #49.
11 It is uncontested that plaintiff never served process on
12 Fruchtenicht. Doc #75 at 4:9-11. Accordingly, the court GRANTS
13 defendants' motion in regard to Fruchtenicht.

14 * * *

15 In sum, defendants' motion to dismiss is GRANTED. The
16 officers and Fruchtenicht are DISMISSED without prejudice.

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18 IT IS SO ORDERED.

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21 VAUGHN R WALKER

22 United States District Chief Judge
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